DISTRIBUTED
NOV 22 83

ORIGINAL

Supreme Court, U.S.
FILED
NOV 22 1983
ALEXANDER L. STEVAS
CLERK

83-620

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

LARRY WAYNE RODGERS,

Respondent.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RAYMOND C. CONRAD, JR.
Federal Public Defender
Western District of Missouri
324 Scarritt Building
818 Grand Avenue
Kansas City, Missouri 64106
(816) 374-5851

ALBERT N. MOSKOWITZ
Assistant Federal Public Defender
Western District of Missouri

Counsel for Respondent

November 17, 1983

TABLE OF CONTENTS

Page

Reasons for Granting the Writ

I. The Issue Involved in the Present Case is Not Significant Enough to Warrant Review by this Court..... 1

II. Even if the Issue Presented is an Important Federal Question, Review at This Time Would be Premature 3

III. Case Law Cited by Petitioner Does Not Provide Persuasive Authority..... 4

IV. Friedman and Rodgers are Well Considered and Should Not be Reviewed or Overturned..... 7

Conclusion..... 14

TABLE OF AUTHORITIES

Cases	Page
Bronston v. United States, 409 U.S. 352 (1972).....	9, 13
Bryson v. United States, 396 U.S. 64 (1969).....	6, 7
Friedman v. United States, 374 F.2d 363 (8th Cir. 1967).....	1,2, 5, 6,7, 8, 9, 10, 11, 12, 13
Paternostro v. United States, 311 F.2d 298 (5th Cir. 1982).....	12
Sorrells v. United States, 287 U.S. 435 (1932).....	10
Terry v. United States, 131 F.2d 40 (8th Cir. 1942).....	10, 11
United States v. Adler, 380 F.2d 917 (2d Cir.), cert. denied, 389 U.S. 1006 (1967).....	2, 3
United States v. Allen, 193 F.Supp. 954 (1961).....	10
United States v. Beacon Brass Co., 344 U.S. 43 (1952).....	13
United States v. Bedore, 455 F.2d 1109 (9th Cir. 1972).....	2, 12
United States v. Bush, 503 F.2d 813 (5th Cir. 1974).....	12
United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976).....	11
United States v. Clifford, 426 F.Supp. 696 (E.D. N.Y. 1976).....	13
United States v. D'Amato, 507 F.2d 26 (2d Cir. 1974).....	10
United States v. Ehrlichman, 379 F.Supp. 291 (D.C. Cir. 1974).....	13
United States v. Erhardt, 381 F.2d 173 (6th Cir. 1967).....	10
United States v. Lambert, 501 F.2d 943 (5th Cir. 1974) (en banc).....	2, 5

United States v. Massey, 550 F.2d 300 (5th Cir. 1977)..... 2, 5

United States v. Moore, 185 F.2d 92 (5th Cir. 1950)..... 8, 10

United States v. Poutre, 646 F.2d 685 (1st Cir. 1980)..... 13

United States v. Rodgers, 706 F.2d 854 (8th Cir. 1983)..... 1, 6, 7

United States v. Rose, 570 F.2d 1358 (9th Cir. 1978)..... 2

Weiler v. United States, 323 U.S. 606 (1944)..... 9

Statutes

18 U.S.C. §1001..... 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12,13

29 U.S.C. §159(c)(1)..... 6

Miscellaneous

H.R. 2013, Criminal Code Revision Act of 1983..... 4

Criminal Code Revision Act of 1983, §1744..... 4

Criminal Code Revision Act of 1983, §1744(a)..... 4

S. 1630 (§1343), 97th Congress, First Session (1981)..... 3

S. 1630 [§1343(a)(1)(A)(i)], 97th Congress, First Session (1981)..... 4

REASONS FOR DENYING THE PETITION

I. The Issue Involved in the Present Case is Not Significant Enough to Warrant Review by this Court.

The question presented is whether 18 U.S.C. §1001 has application to a very narrow set of facts. Specifically, may an individual who knowingly volunteers false information to an investigative agency such as the Federal Bureau of Investigation or Secret Service be prosecuted under §1001?

In 1967, the Eighth Circuit, in a case styled Friedman v. United States, 374 F.2d 363 (8th Cir. 1967), decided, after an extensive review of the relevant legislative history and a careful consideration of the policy ramifications, that the term "jurisdiction" as used in the statute does not apply to a purely investigative agency such as the FBI. The Friedman Court stated:

> The F.B.I. had authority to investigate, and in that broad sense it had "jurisdiction." However, it had no power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry. In this restrictive sense, the investigation of a possible violation of the criminal law is not a matter over which the F.B.I. exercises "jurisdiction." It is in this more restrictive sense, we believe Congress intended to use the word "jurisdiction" in determining violations of §1001.

Id. at 368.

Since the ruling in Friedman, a period of approximately sixteen years, the Eighth Circuit has been confronted with a similar set of facts only once, the instant case, in which the Eighth Circuit reaffirmed its holding in Friedman, United States v. Rodgers, 706 F.2d 854 (8th Cir. 1983).

Moreover, in that same sixteen-year period, only two other Circuits have had occasion to consider the narrow issue presented in Friedman, the Fifth Circuit in United States v. Lambert, 501 F.2d 943 (5th Cir. 1974) (en banc), and United States v. Massey, 550 F.2d 300 (5th Cir. 1977), and the Second Circuit in United States v. Adler, 380 F.2d 917 (2d Cir.), cert. denied, 389 U.S. 1006 (1967), the limited number of occasions with which courts have been presented with this precise issue illustrates its lack of pressing significance on a national level.[1]

Moreover, this Court has on at least one prior occasion refused to grant certiorari in a similar situation. In United States v. Adler, 380 F.2d 917 (2d Cir.), cert. denied, 389 U.S. 1006 (1967), the Second Circuit rejected the Friedman result on nearly identical facts. The petitioner in that case, like the petitioner in the present case, sought review in this Court by noting inter alia,

---

[1] There are at least two additional cases which approach but do not directly focus in on the precise question presented here. In United States v. Rose, 570 F.2d 1358 (9th Cir. 1978), the false statements were made by the defendant to a Border agent in "a routine exercise of his administrative responsibility." (Court's emphasis). Id. at 1364. The Rose Court was careful to stress that the defendant "was claiming a privilege of entry. . . ." Id. at 1364. Even under the Friedman rationale, such false statements would have been considered within the ambit of the statute, since the agent to whom the falsehoods were made had the power to "grant governmental privileges."

In United States v. Bedore, 455 F.2d 1109 (9th Cir. 1972), the Court found that the defendant's false declaration to an FBI agent regarding his identity was not a "statement" designed to be proscribed by §1001. In dicta, the Bedore Court did briefly express an opinion that false reports of crimes may constitute an offense under §1001. However, no facts were presented to the Bedore Court which required any such ruling. Moreover, even the Bedore Court emphasized the need to read §1001 restrictively when it noted that "Extension of §1001 to its literal breadth, however, cannot be justified by its legislative history." Id. at 1110.

that the Second and Eighth Circuit cases represented a conflict in the Circuits. The Government in the Adler case filed a Brief in Opposition to the Petition urging this Court to deny certiorari and certiorari was not granted in 1967. 389 U.S. 1006 (1967). The Government now has apparently changed its mind and feels that a review is necessary. There is little that has occurred since the Adler denial, however, which would require this Court to alter its position on the matter. In fact, the paucity of relevant decisions in the Federal Court since 1967 underscores the general insignificance of the question and reinforces the correctness of this Court's earlier decision not to consider the issue.

II. Even if the Issue Presented is an Important Federal Question, Review at This Time Would be Premature.

Should this Court decide that there is a public concern significant enough to warrant a grant of certiorari, nevertheless, review at this time would be inappropriate.

Only three Circuits have as yet squarely addressed the question of whether "jurisdiction" encompasses purely investigative functions: the Second, Fifth and Eighth Circuits. As a result, no clear concensus has emerged. It would be prudent and proper to delay any final review of this question until additional Circuits have had an opportunity to consider the issue.

Moreover, the issue could resolve itself should Congress pass legislation clarifying the reach of §1001. As recently as 1981, Congress had before it proposed legislation which would have settled the question and obviated any need for review from this Court. See S. 1630

(§1343), 97th Congress, First Session (1981).[2] This proposed bill passed the Senate, but failed approval in the House of Representatives.

Presently pending before Congress is H.R. 2013, Criminal Code Revision Act of 1983. §1744 of this Act would make it a Class A misdemeanor to provide false information to any federal organization regarding an emergency situation. §1744(a). The passage of such legislation would appear to resolve some of the specific questions presented by the instant case.[3]

In view of Congress' continuing concern with the false statement law, it is not unreasonable to expect in the near future legislation which would clarify the reach of §1001. Should such legislation be adopted, any decision by this Court at this time on this issue would have minimal precedential value. The resources of this Court should be more properly applied to issues of greater general importance to the public. Moreover, it would be an appropriate exercise in judicial restraint to allow Congress additional opportunity to consider and possibly dispose of the matter rather than to hastily impose a judicial solution on what is essentially a legislative area of concern.

III. Case Law Cited by Petitioner Does Not Provide Persuasive Authority.

Petitioner's argument relies to a large extent on

---

[2] Proposed §1343 specifically provided inter alia that one who makes material false oral statements to "a law enforcement officer" may violate the law. S. 1630, §1343(a)(1)(A)(i)

[3] H.R. 2013 has been referred to the Subcommittee on Criminal Justice of the House Committee on the Judiciary.

case law from the Fifth and Second Circuits. That case law cited by petitioner does not provide persuasive authority for this Court to question the result reached by the Eighth Circuit in Friedman.

Petitioner cites United States v. Massey, 550 F.2d 300 (5th Cir. 1977), and that case is factually similar to the case at bar. But the Massey Court did not base its affirmance of a §1001 conviction on an independent analysis of the statute; rather, that Court relied almost entirely on prior precedent in the Fifth Circuit, specifically on United States v. Lambert, supra. The authority of United States v. Lambert, supra, however, is considerably diminished by the vigorous dissent filed by seven Judges. Those seven Judges did not disagree with the majority's reversal of the defendant's conviction; in fact, they concurred with the result. The dissent wrote to express their strongly-held view of the importance "of preserving an open line of communication between private citizens and law enforcement agencies." United States v. Lambert, supra, at 952. The dissent recognized that such a significant national policy can only be impaired by a literal interpretation of §1001, a position which the Rodgers and Friedman Courts embraced and which should be continued to be supported by this Court.

United States v. Adler, supra, is also cited by the petitioner. The Adler decision, however, lacks persuasiveness because, unlike the Court in Friedman, no detailed analysis of the legislative history of §1001 was undertaken by the Second Circuit; nor does there seem to be in Adler the kind of careful consideration of policy

concerns so evident in the Friedman opinion. Rather, the Court in Adler relied very heavily on a 1969 Supreme Court decision, Bryson v. United States, 396 U.S. 64 (1969). The Second Circuit's reliance on Bryson, however, is misplaced, for the factual setting in Bryson differs considerably from that involved in the present case.

In Bryson, the false statement was not given to a criminal investigative agency. Rather, the N.L.R.B. was the victim of the falsehood, an agency which has the power to adjudicate rights and establish binding regulations and which, even under the Friedman and Rodgers rationale, would be subject to the protection of the statute. United States v. Rodgers, supra, at 856.

The petitioner argues that, since an investigative function of the N.L.R.B. may have been affected by the submission of the false affidavit, Bryson is in reality good authority for the proposition that Friedman and Rodgers were incorrectly decided. (Petition for a Writ of Certiorari, p. 12). The investigatory power of the N.L.R.B., however, does not comprise its sole or even primary function. That power is merely the means by which the agency can determine whether to grant further rights and remedies such as a hearing, an election and a certification thereof. 29 U.S.C. §159(c)(1). The N.L.R.B., unlike the criminal investigatory agencies, retains the power "to adjudicate rights . . . compel the action or finally dispose of the problem giving rise to the inquiry." Friedman v. United States, supra, at 368. Any investigatory function given to the N.L.R.B. is merely ancillary to its broader authority to "finally dispose of the problem." Id.

Moreover, because the N.L.R.B. is not an investigatory body similar to the FBI or Secret Service, the broad social policy protected by the Friedman and Rodgers rulings was not a factor that this Court had occasion to weigh in Bryson. The crucial distinctions between Friedman and Bryson were noted by this Court when it expressly refused to "either . . . approve or disapprove Friedman's holding." Bryson v. United States, supra, at 71, n. 10. Petitioner's attempts to minimize those differences directly contradict this Court's express recognition of them.

IV. Friedman and Rodgers are Well Considered and Should Not be Reviewed or Overturned.

Unlike several of the decisions cited by the Government, the Eighth Circuit in Friedman undertook a rather detailed review of the legislative history of §1001 in the belief that where questions of statutory construction are concerned, the legislative history and purpose of the statute are highly significant. Friedman v. United States, supra, at 366. On the basis of that review, the Eighth Circuit found that the central purpose of §1001 was to curtail the flow of false information to various federal agencies created to deal with the economic collapse of the depression. Id. This counsel has not found, nor has the Government cited, any new or additional information tending to alter the conclusion reached by the Eighth Circuit in Friedman that false statements to criminal investigative agencies were simply not envisioned by Congress when it passed the present legislation.

It is true, of course, that Congress did not expressly prohibit the extension of §1001 to criminal investigative agencies. But, as the Eighth Circuit noted,

it is a well-recognized rule of statutory construction "'[t]o construe statute so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose. . . .'" Friedman v. United States, supra, at 366. The Friedman Court correctly stated that a "literal application of this statute can reach patently absurd results." Id. at 366.

For example, a broad interpretation of §1001 would make it a more severely punished crime to be untruthful to an agent of the Federal Bureau of Investigation during an investigation than to lie under oath before a court of law.[4] Id. Moreover, under a literal application of the statute, "anything more than a casual social conversation with a government employee would, without warning, subject the speaker to the possibility of severe punishment." Friedman v. United States, supra, at 366. As the Friedman Court noted,

> This is a formidable, indeed a dangerous, power the Government assumes the statute invests in law enforcement officials. We cannot blithely assume that Congress granted such a sweeping power. It is our position that such a formidable police authority must be clearly authorized. It will not be assumed to exist. If the Congress wanted unsworn statements to investi-

---

[4] An interesting discussion of the harshness of the statute can be found in United States v. Moore, 185 F.2d 92 (5th Cir. 1950). In that case, the Court refused to apply the statute to a specific situation, noting that:

> Under familiar canons of construction a penal act of the harshness and rigor of this one,—a harshness and rigor so great that, as the revisers point out in the notes to the Code as amended in 1948, the punishment was deliberately reduced from ten to five years—the statute will not be stretched beyond, it will be strictly confined within, the fair meaning of its terms.

Id. at 95.

> gative officials to serve as the basis for severe criminal punishment, we think it would have said so in clear, direct and positive terms.

Id. at 366-7.

Finally, the Eighth Circuit was concerned that a "strict application of this statute would remove a time-honored and now necessary formality of requiring witnesses to testify under oath." Friedman v. United States, supra, at 367. Nothing has occurred in the intervening years since the Eighth Circuit decided Friedman to alleviate that concern. Today, as then, one "simply cannot believe that Congress intended to supplant the existing perjury statutes and destroy the protections they afford."[5] Id. at 367. Indeed, the rationale for a restrictive reading of §1001 has, if anything, become more compelling with the passage of time. Subsequent to the Friedman case, this Court has increased the safeguards provided by the perjury law. In Bronston v. United States, 409 U.S. 352 (1972), this Court restricted the scope of the perjury statute by holding that an incomplete, misleading or deceptive statement, if literally true, does not constitute perjury. If such a limitation is not applicable in a §1001 context, then a broad reading of that statute would invite avoidance of the requirements announced by this Court in Bronston.[6] As a result, to adopt

---

5 One safeguard provided an accused under the existing perjury law but not under §1001 is the two-witness rule which bars conviction for perjury on the uncorroborated testimony of a single witness. See Weiler v. United States, 323 U.S. 606 (1944).

6 If, on the other hand, the Bronston ruling is applicable in a §1001 context, then other problems arise. For a discussion, see Infra pp. 13-14.

at this time the new overexpansive view of §1001 suggested by the petitioner is, as the Eighth Circuit stated in Friedman, to bring "about absurd consequences . . . not intended by Congress." Id. at 367, quoting Sorrells v. United States, 287 U.S. 435, 446 (1932).

Nor did the Eighth Circuit take a unique position in holding that §1001 "must have some effective limits." Friedman v. United States, supra, at 367. Federal Courts have repeatedly refused to apply the statute in a literal manner. For example, despite the apparently all-inclusive wording of the statute, at least one court has refused to apply §1001 to the introduction of false documents in a criminal proceeding. United States v. Erhardt, 381 F.2d 173 (6th Cir. 1967). Another court has found the prohibitions of §1001 inapplicable to preliminary inquiries by an agency to determine jurisdiction under the Fair Labor Standards Act. United States v. Moore, 185 F.2d 92 (5th Cir. 1950). A third court held that false statements to a grand jury are not false statements within the meaning of the statute. United States v. Allen, 193 F.Supp. 954 (1961). The Eighth Circuit has refused to extend coverage of the law to false statements on loan applications, even though some governmental involvement may be present. Terry v. United States, 131 F.2d 40 (8th Cir. 1942). False statements in a civil suit in Federal Court were held by the Second Circuit not to be within the ambit of the statute. United States v. D'Amato, 507 F.2d 26 (2d Cir. 1974). And several courts have ruled that a suspect in a criminal investigation may not be charged with the violation of §1001 simply because he falsely denies incriminating information, the so-called

"exculpatory-no" doctrine. See United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976), and cases cited therein at 183, n. 9 and 10.

While the specific rationale for refusing to extend coverage of this statute in a particular factual setting may not always be clear or consistent, it is certain that judicial restraint in applying the false statement prohibition has been common. The Eighth Circuit position falls squarely within this tradition of restraint.

Unlike many of the cases cited above, however, the Eighth Circuit did more than merely refuse to apply the statute to a specific situation. The Eighth Circuit established a clear and rational dividing line and so managed to define the proper limits of the law in a way which could provide guidance for the future. Friedman v. United States, supra, at 367-9. That rule was based on a proper interpretation of the phrase "within the jurisdiction" and was "made in the light of the legislative intent as it has been disclosed in the acts of Congress." Terry v. United States, supra. To withdraw that precedent or to distinguish the rule into oblivion would be to take away the consistent guidance offered by Friedman.

In addition, the Friedman rule serves a useful social function. It promotes "the important social policy that is served by an open line of communication between the general public and law enforcement agencies." Friedman v. United States, supra, at 369. The fear is not that otherwise innocent persons may be convicted under §1001, but that the mere possibility of prosecution will exercise a chilling effect on the public's interaction with

law enforcement agencies. The irony of the petitioner's position for a wide-open interpretation of §1001 is that such a view of the statute may result, not in the overall deterrence of criminal activity, but in its encouragement; for with an unfettered reading of the statute, information that could lead to arrests may be increasingly difficult to obtain. The Eighth Circuit, in promulgating a general rule of exclusion, understood the dangers of inhibiting voluntary disclosures. Those risks remain and need to be guarded against today no less than when the Friedman Court rendered its decision.

The rule announced in Friedman is significant as well in its ability to harmonize difficult legal and factual problems. The "exculpatory-denial" situation is a good example. Under a literal interpretation of the statute, such a false denial is clearly subject to prosecution. While many courts have allowed for the exception, the rationale and exact scope of the exception are not always made clear. Paternostro v. United States, 311 F.2d 298 (5th Cir. 1982). Certainly, there is a logical inconsistency in excluding a denial but punishing other kinds of statements. After all, a "denial" may be no less false or misleading than any other kind of statement. Moreover, there is often a factual problem in deciding when a statement constitutes a negative "denial" or a positive "statement". United States v. Bedore, 455 F.2d 1109 (9th Cir. 1972); United States v. Bush, 503 F.2d 813 (5th Cir. 1974). Under the Friedman rule, however, there is no difficulty in reconciling the language of the statute with the "exculpatory-no" doctrine, since virtually any statement to an investigative agency falls out-

side the scope of the statute.

The Friedman rule makes sense in another context as well. Until recently, there has been little question that a statement, if contemplated by the act, may be either written or oral. United States v. Beacon Brass Co., 344 U.S. 43, 46 (1952). However, this Court in Bronston v. United States, 409 U.S. 352 (1973), has limited the scope of the perjury statute by ruling that misleading statements which are technically true do not constitute a violation of that law. This ruling has reopened the question of whether oral as well as written statements are "statements" for purposes of §1001. If a Bronston defense is available to defendants charged under §1001, then that defense is not truly available unless the statement in question is in writing; for, where the statement is not in writing, the defendant may be faced with a difficult, if not impossible, task of "arguing that his statements . . . were literally true on the sole basis of the agent's sketchy notes. . . ." United States v. Ehrlichman, 379 F.Supp. 291, 292 (D.C. Cir. 1974). In United States v. Poutre, 646 F.2d 685 (1st Cir. 1980), the Court seriously considered the need for written testimony as a foundation for a §1001 charge, since "what is actually said by a defendant becomes a critically important part of any prosecution under §1001." Id. at 688.[7] See also United States v. Ehrlichman, supra, and United States v. Clifford, 426 F.Supp. 696 (E.D. N.Y. 1976). Under Friedman, however, the Bronston problem, at least in the context of statements to investigative agencies, is rendered moot, since such statements, whether

---

[7] The Poutre Court stopped short of making a blanket ruling that false statements charged under §1001 must be in writing.

oral or written, are not cognizable under the statute.

CONCLUSION

For any and all of the reasons cited above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RAYMOND C. CONRAD, JR.
Federal Public Defender
Western District of Missouri
324 Scarritt Building
818 Grand Avenue
Kansas City, Missouri 64106
(816) 374-5851

ALBERT N. MOSKOWITZ
Assistant Federal Public Defender
Western District of Missouri

Counsel for Respondent

November 17, 1983

MOTION FILED
NOV 22 1983
DISTRIBUTED
NOV 22 '83

ORIGINAL

83-620

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

LARRY WAYNE RODGERS,

Respondent.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

RAYMOND C. CONRAD, JR.
Federal Public Defender
Western District of Missouri
324 Scarritt Building
818 Grand Avenue
Kansas City, Missouri 64106
(816) 374-5851

ALBERT N. MOSKOWITZ
Assistant Federal Public Defender
Western District of Missouri

Counsel for Respondent

November 17, 1983

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

LARRY WAYNE RODGERS,

Respondent.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW respondent, LARRY WAYNE RODGERS, by his attorneys, Raymond C. Conrad, Jr., Federal Public Defender, Western District of Missouri, and Albert N. Moskowitz, Assistant Federal Public Defender, Western District of Missouri, and moves this Court, pursuant to 28 U.S.C.A. §1915, 18 U.S.C.A. §3006A(d)(6) and Rules 46.1 and .2, U.S. Sup. Ct. R., for leave to file a Brief in Opposition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit without prepayment of docket or other fees, and to proceed in forma pauperis. The Brief accompanies this Motion.

On September 2, 1982, respondent was charged in a two-count Indictment returned to the United States District Court, Western District of Missouri, Western Division, with violations of 18 U.S.C. §1001. Following his arrest, the respondent submitted an Affidavit of Financial Status to the District Court. Based upon that Affidavit, the United States Magistrate, pursuant to 28 U.S.C. §636(a)(1) and (2), 636(b)(4), Rules 26.I.A.1. and 2., and 26.XI.B., U.S. Dist. Ct. R., W.D.-Mo., permitted him to proceed in forma pauperis, in accordance with 28 U.S.C. §1915(a) and (c), and appointed undersigned counsel to represent respondent, in accordance with 28 U.S.C. §1915(d), 18 U.S.C. §3006A(a), (b) and (c), and Rules 44 and 5(c), Fed. R. Crim. P. The District Court subsequently dismissed both counts against the respondent.

An appeal was taken by the Government to the United States Court of Appeals for the Eighth Circuit. By Order filed December 13, 1982, that Court, pursuant to 28 U.S.C. § 1915(a), (b) and (c), 18 U.S.C. §3006A(d)(6), and Rule 24 (a) ¶2, Fed. R. App. P., authorized him to proceed in forma pauperis. It also re-appointed the undersigned to represent respondent on appeal, in accordance with 28 U.S.C. §1915(c) and (d), 18 U.S.C. §3006A(c), Rule 47, Fed. R. App. P., and its Plan to Implement the Criminal Justice Act of 1964, Introduction (1) and Section II(1). U.S. Ct. App. R., 8th Cir.

Because both the United States District Court, Western District of Missouri, and the United States Court of Appeals for the Eighth Circuit permitted respondent to proceed in forma pauperis and appointed counsel for him, no affidavit in support of his Motion to Proceed in

Forma Pauperis in this Court is required. 18 U.S.C. §3006A(d)(6); Rule 46.1, U.S. Sup. Ct. R.

RAYMOND C. CONRAD, JR.
Federal Public Defender
Western District of Missouri
324 Scarritt Building
818 Grand Avenue
Kansas City, Missouri 64106
(816) 374-5851

ALBERT N. MOSKOWITZ
Assistant Federal Public Defender
Western District of Missouri

Counsel for Respondent

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

LARRY WAYNE RODGERS,

Respondent.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND OF BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RAYMOND C. CONRAD, JR.
Federal Public Defender
Western District of Missouri
324 Scarritt Building
818 Grand Avenue
Kansas City, Missouri 64106
(816) 374-5851

ALBERT N. MOSKOWITZ
Assistant Federal Public Defender
Western District of Missouri

Counsel for Respondent

November 17, 1983

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

LARRY WAYNE RODGERS,

Respondent.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND OF BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

In accordance with Rules 42.3, 19.3, 46.4, 28.3, 28.4.(a), 28.5 and 28.5.(b) of the United States Supreme Court Rules, I hereby certify that one copy of the accompanying Motion for Leave to Proceed in Forma Pauperis and Brief in Opposition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit was mailed, with prepaid first-class postage affixed, to the Honorable Rex Lee, Solicitor General of the United States, U. S. Department of Justice, Washington, D.C., 20530, Counsel for Petitioner, and one copy of each was hand delivered to Cynthia Clark-Campbell, Assistant U.S. Attorney, Western District of Missouri, 549 U.S.

Court House, 811 Grand Avenue, Kansas City, Missouri, 64106, Counsel for Petitioner, this 17th day of November, 1983. I further certify that all parties required to be served have been served.

Raymond C. Conrad Jr.

RAYMOND C. CONRAD, JR.
Federal Public Defender
Western District of Missouri

ALBERT N. MOSKOWITZ
Assistant Federal Public Defender
Western District of Missouri

Counsel for Respondent